No. 16097

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ROBERT E. AUSTIN and MARIAN H. AUSTIN,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITIONERS' BRIEF ON APPEAL.

ROBERT E. AUSTIN, and
WENDELL H. DAVIS,
215 West Seventh Street,
Los Angeles 14, California,
Attorneys for Petitioners.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction and Venue.

This is an appeal from a decision of the Tax Court of the United States deciding that there are deficiencies in petitioners' income tax for the years 1950, 1951 and 1952. The Tax Court had jurisdiction to determine whether there were deficiencies after the Collector of Internal Revenue had made deficiency assessments. (26 U. S. C. A. 1100, 1101.)

The Courts of Appeal have jurisdiction to review proceedings of the Tax Court of the United States. (28 United States Code, Sec. 2074; Rules of Court of Appeals, Ninth Circuit, Rule 29.)

Venue in this matter is with the Court of Appeals for the Ninth Circuit since petitioners are and were during

the years in question residents of Manhattan Beach, California. They filed income tax returns with the office of the Collector at Los Angeles, California. The alleged deficiencies were assessed from the Los Angeles office. The trial before the Tax Court was had in Los Angeles.

Specification of Error.

The court erred in making its finding that [Tr. p. 26] "the lots sold by petitioners were held by them primarily for sale to customers in the ordinary course of trade or business" in that said finding is contrary to the evidence.

Statement of the Case.

This case involves an alleged deficiency in income tax returns for the years 1950, 1951 and 1952.

The question presented is whether certain vacant lots, which were acquired by petitioners over a period of years, and which were sold during the years in question, were held by petitioners primarily for sale to customers in the ordinary course of their trade or business so as to be excluded from the term "capital assets" as defined by Section 117(a)(1), (j)(1) of the Internal Revenue Code of 1939.

Petitioners acquired certain vacant real estate through various fortuitous circumstances over a period of years and sold some of it during the years in question. Petitioners always deemed such acquisition and sale as the acquisition and sale of investments. The Commissioner of Internal Revenue and the Tax Court regard petitioners as having been in the real estate business. The difference,

of course, is a difference in taxes as applied to capital assets and ordinary income.

We accept most of the findings of fact of the Tax Court. We do not accept the finding which is really a conclusion of law that the lots sold were held primarily for sale to customers in the ordinary course of trade or business.

The Tax Court found the following facts pursuant to stipulation [Tr. pp. 17, 13, 16]:

Stipulation of Facts.

"It is stipulated that the following facts may be received in evidence without further proof; provided, however, that this stipulation shall be without prejudice to the right of either party to introduce other and further evidence not inconsistent with the facts stipulated; and provided, further, that both parties to this stipulation reserve the right to object to the materiality and relevancy of any of the facts herein stipulated.

1. The petitioners are individuals; are husband and wife, and reside at 500 Poinsettia Avenue, Manhattan Beach, California. The income tax returns for the period here involved, 1950, 1951 and 1952, were filed with the Collector, now Director, for the Los Angeles District of California. Photostatic copies of the returns are attached as joint exhibits 1-A, 2-B, 3-C and 4-D.

2. Petitioner, Robert E. Austin is a lawyer engaged in the private practice of law, and has been so engaged for the past forty years, having his law office in down town Los Angeles.

3. Petitioner, Marian H. Austin, at all times mentioned in this proceeding has been a housewife.

4. All lots and sales involved were in the Manhattan Beach area, except one.

5. The real estate purchases and sales by petitioner for the years 1943 to 1952, inclusive, are as follows:

	Purchases		Sales	
Year	Number of Transactions	Number of Lots	Number of Transactions	Number of Lots
1943	2	2	0	0
1944	2	5	0	0
1945	3	69½	0	0
1946	6	64½	24	38
1947	6	16	8	13
1948	3	9	22	26
1949	1	1	7	15
1950	1	1	5	11
1951	....	....	8	23
1952	....	....	10	14

During the years 1950, 1951 and 1952 petitioners received profits from twelve sales of prior years that were made on installment terms.

6. Petitioners' income from all sources for the years 1943 to 1952, inclusive, was as follows:

GROSS INCOME 1943 TO 1952, INCLUSIVE, OF PETITIONERS ROBERT E. AUSTIN AND MARIAN H. AUSTIN

Rent	Income from Interest	Number of Law Practice Fee Collections	Gross Amount Law Practice Fee Collections	Net Profit On Real Estate Sales	Gross Income	Net Collections From Law Practice
1,890.00	195.00	101	3,849.10	.....	5,934.10	1,832.93
1,140.00	.....	106	6,628.23	678.00	8,446.23	4,434.48
.....	.....	122	9,081.18	210.32	9,291.50	5,444.90
.....	.....	89	5,345.00	17,655.71	23,000.71	1,756.62
7,596.00	390.00	77	7,649.15	12,357.70	27,992.85	3,502.89
10,762.79	288.40	76	5,977.40	6,737.12	23,765.71	2,166.40
5,838.50	696.38	83	6,079.19	6,029.72	18,643.79	1,476.43
5,456.00	522.51	91	5,232.67	7,782.56	37,637.53	1,162.91
6,820.94	897.72	140	9,360.80	10,476,79	27,556.25	4,851.60
7,125.00	2,144.07	117	6,156.68	9,308.59	24,734.34	1,279.08

7. The taxpayers for many years have been residents of the City of Manhattan Beach. Mr. Austin has been active in local affairs there for many years. He served as School Trustee, helped organize the local water district, participating in many elections relating thereto, and has been a member of the Directors of the water district, and is presently the representative of that district on the Board of the Metropolitan Water District of Southern California.

8. The telephone at home is and always has been listed in Mrs. Austin's name. It is 'Austin, Marian H., 500 Poinsettia Ave., Manhattan Beach.' Mr. Austin's name has never been listed in the Manhattan Beach telephone directory.

9. Manhattan Beach is approximately 19 miles from downtown Los Angeles.

10. If it is determined that either or both are in the real estate business then the Commissioner has properly determined the self-employment tax as shown in the statutory notice of deficiency."

(signed by both parties).

The Tax Court further found as follows:

That petitioners are husband and wife; that Marian H. Austin is a housewife, and had little connection with the Transactions.

That petitioner, Robert E. Austin, "has practiced law since 1912, and at all times here relevant had his law office in downtown Los Angeles, approximately nineteen miles from Manhattan Beach" where all lots involved were except one.

"One hundred and two of the lots acquired during 1945 and 1946 were sold to petitioners by the City of Manhattan Beach. The sales arose from the fol-

lowing circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter referred to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan petitioner, Robert E. Austin, and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement" petitioners "purchased 102 lots which the city had acquired from the State and which it was unable to dispose of at public auction." [Tr. pp. 19-20.]

"Petitioners purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with" petitioners' "membership in the Manhattan Beach Property Owners Association and that Association's interest in acquiring a park." [Tr. p. 20.]

"Two of the lots acquired by petitioners in 1946 were located across the street from where they then resided, and were purchased to protect the character of the neighborhood.

"Petitioners acquired 21 lots in 1946 from The Amaranth Land Company. These acquisitions came about in the following manner: A client of 'petitioner' was involved in a joint venture concerning real property. At the death of the client petitioner was retained by decedent's family to represent them in the disposition of the joint venture's property.

In the course of winding up the joint venture, and while acting on behalf of the family, 'petitioner' entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in 'petitioner's' actions on their behalf. Petitioner 'paid the amount bid to the joint venture and the property was sold to him.'

" 'Petitioners purchased one lot in 1946 and four in 1947.' These acquisitions were to be used in conjunction with property already owned by them. In 1947 petitioners acquired 2 lots in payment for legal services.

"Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to 'petitioner's' office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told 'petitioner' that he had been advised that he (the client) did not have long to live, and asked 'petitioner' to purchase the daughter's property. 'Petitioners' purchased two lots from the daughter. Shortly thereafter the client died." [Tr. pp. 21-22.] Taxpayer thought the lots were encumbered for all they were worth, and permitted one of them to be sold for taxes and bond, and abandoned the other, but later somebody made an offer sufficient to pay off the delinquent taxes and bond and left a small profit. [Tr. p. 65.]

"Petitioners purchased one lot in 1950 from a neighbor who was unable to pay a debt to petitioner. They paid for the lot, in part, by cancelling the indebtedness." [Tr. p. 22.]

"Petitioners did not advertise in connection with their real property, nor did they post any 'for sale' signs. They did not list their property with real estate brokers, and neither of them was a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin.

"Sales were initiated by prospective customers contacing petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties.

"Whenever necessary 'petitioner' would prepare legal documents in connection with a sale in his law office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners' home."

All income tax returns in evidence—the earliest 1950—show that petitioner, Robert E. Austin, was more than 65 years of age; he had practiced law for 45 years. [Tr. p. 39.]

Real estate acquisitions and sales took an infinitesimal amount of time as compared to petitioner's law practice. [Tr. p. 71.] He very seldom met the purchasers. [Tr. p. 72.] Did not subdivide or improve any of the lots involved here. [Tr. p. 73.]

ARGUMENT.

The sole question here is—Was the evidence before the Court below sufficient to sustain the finding that the Real Property sold by petitioners in 1950, 1951 and 1952 was *held by them primarily for sale to customers in the ordinary course of their trade or business?* The Court thought the evidence was. We think that it was not; hence this appeal.

41 of the 48 lots sold in those 3 years, 1950, 1951 and 1952, were acquired in 1945-1946, four to seven years prior to the sales. [Tr. p. 23.] The other seven—one was purchased in 1943—seven years before its sale. 2 were purchased in 1944, eight years before they were sold. 1 was purchased in 1947, five years before it was sold. 2 in 1948, three years before they were sold. 1 in 1949, three years before it was sold. [Tr. p. 23.] Only 1 lot was acquired by taxpayers in the period under consideration (1950, 1951 and 1952), [Tr. p. 19] and that was taken in settlement of a debt [Tr. p. 22], and sold years later. Only 1 was acquired in 1949. That was to provide for parking and sewage disposal for other property owned by taxpayers. [Tr. p. 22.] Of the 9 lots acquired in three purchases in 1948, 4 were in purchase of a home [Tr. p. 22], and 2 were to provide parking for other lots owned by taxpayer.

The question whether the lots were held by taxpayers primarily for sale to customers in the ordinary course of their trade or business is a question of fact to be determined by the court. But there must be some substantial evidence to sustain such a finding. The mere fact that taxpayer has made sales and realized profits certainly is insufficient to sustain a finding that the sales were made to customers in the ordinary course of *taxpayers' busi-*

ness. The statute expressly provides that the owner of property may sell it at a profit and be entitled to have it considered a capital asset, and the profits taxed on that basis, if the sales are not made to customers in the *ordinary course* of *taxpayers' business.* The cases seem to agree that some activity must be present besides the mere ownership of property and willingness and opportunity to sell. We think there was no other element in the present case.

The cases say that the Court may look the general situation over for factors indicating that the seller is in business or promoting sales, or that he has or seeks customers. This Court in a well-considered opinion in the case of *Pool v. Commissioner* (9th Cir.), 251 F. 2d 233, sets forth five factors which may be considered in determining if sales are to *customers* and in the *ordinary course of sellers trade or business.* They are:

1. Nature of acquisition of the property;
2. Frequency and continuity of sales;
3. Nature and extent of taxpayer's business;
4. Activity of seller about the property; and
5. Extent and substantiality of the transactions.

We think that each of these factors demonstrate in our case that the taxpayers' lots were not held primarily for sale to customers . . . they were just held . . . because there was nothing else taxpayers could do with them; that taxpayers had no customers . . . and didn't seek any; that taxpayers were not in the trade or business of selling lots; that purchasers of their lots were in no sense customers. We will discuss the factors set out in the *Pool* case as we think they apply to our case, as follows:

Nature of Acquisition of the Property.

The finding of facts of the court below shows that 168 lots were acquired in ten years beginning in 1943 and ending with 1952. Only 1 was acquired in the period under consideration here, but it was not sold in that period. 132 of these were acquired in 1945-1946 in three transactions. In one transaction 102 lots were acquired from the City of Manhattan Beach because taxpayer and others had guaranteed the City it could sell them. [Tr. pp. 19-20.] The City tried and held unsuccessful auction sales, and called on the guarantors to make good their guarantee. Taxpayers share was 102 lots. This deal originated in 1944. It was finalized in 1945 and lots were delivered in 1945 and 1946.

In another 21 lots were acquired for $2,400.00 ($114.29 each) through a misunderstanding with a client for whom taxpayer had taken them at that price in settlement of some of her business. This transaction occurred in March, 1946. [Tr. pp. 20-21.]

In the third, taxpayer acquired 9 lots for $575.00 ($63.89 each) to help get land desired for a City Park. This transaction occurred in March, 1945. [Tr. pp. 53-54.]

Certainly nothing in any of these three purchases could indicate that taxpayer was buying lots for sale to customers. These three purchases account for 132 of the 168 lots acquired by taxpayer in the ten year period presented by the Commissioner to sustain the theory that taxpayer was in business of buying and selling real estate. Only 27 lots (11 transactions) occurred in the six years after the 1945-1946 acquisition. In the last four years of that period only two transactions occurred

each for one lot and in different years. Only 1 lot was acquired in 1949. [Tr. p. 22.] It was purchased for the purpose of furnishing parking and sewage disposal area to an adjoining property owned by taxpayers. In 1950 only 1 lot was acquired. [Tr. p. 22.] That was taken in payment of a debt. No property was acquired in either 1951 or 1952.

The 36 lots acquired in the ten year period besides the 132 acquired in the three transactions in 1945-1946, were acquired in 15 transactions in six different years. They were as follows:

1 lot in 1943 at a tax sale in which taxpayer without expectation of buying placed 30 or 40 lots on the tax collector's sales list and appeared under agreement to make opening bid on each. [Tr. p. 19.] One lot was struck off to taxpayer who owned it until 1950, seven years later.

1 lot bought at same tax sale for $29.00 for a friend who had used all his cash. The lot was later left on taxpayer's hands and abandoned.

14 lots for homes:

6 lots on which taxpayers are now living [Tr. p. 21];

4 lots for home bought and used in 1948 [Tr. p. 22];

4 lots across street from home in which taxpayers were living prior to 1948, to protect it from use as a stockyard or other obnoxious purpose;

6 lots bought because they were adjacent to lots already owned by taxpayers and were needed for parking and sewage disposal [Tr. pp. 21-22];

3 lots in Riverside and San Bernardino Counties, more than 100 miles from other lots acquired by taxpayer taken as fees and lost for nonpayment of taxes [Tr. p. 19];

2 lots near Sunland, many miles from other property owned by taxpayers, and of different character, taken partly in payment of fee for legal services, and held several years [Tr. p. 21];

2 lots taken from a friend in distress, one of which was abandoned [Tr. p. 22];

2 lots from a business associate in settlement of an account [Tr. p. 20];

2 lots were returned by a young friend for whom taxpayers bought them to help him [Tr. p. 27];

2 lots for investment, and still owned by taxpayers [Tr. p. 22];

1 lot taken for debt [Tr. p. 22];

None of these purchases were made under conditions that would support a presumption or assumption that taxpayers were in real estate business, or was buying for sale to customers. None of the 132 lots were salable at the time taxpayers purchased them, and only 27 lots of the 168 were bought after the war when it began to appear that lots in that area might be salable.

The 102 lots were part of a large number of lots that had been deeded to the State of California for failure of the owners to pay taxes on them [Tr. p. 20]. The City had attempted to sell them at auction. There were no bidders. None of this property was salable till after the war ended, and no one knew that it would then be in demand. It was not in demand at the end of the first world war and had remained idle and useless till after the end of the second world war. The 21 lots were the residue of property owned by The Amaranth Land Co. One of its promoters was dead and the others approved a sale of these lots at $114.29 each. There could have been no mar-

ket known to them or they would not have approved this sale. The sale of the nine lots by the Pacific Land and Title Co. at $63.89 each is more proof that there was no market for any of this property. The acquisition of such property by taxpayer, a lawyer then more than sixty years old with no experience in real estate business, was to say the least improvident. Nowhere does a purpose to go into business, or acquire property for sale to customers appear.

Frequency and Continuity of Sales.

When taxpayers found themselves with 132 lots on hand which they didn't know what to do with in 1946, their position was certainly that of an investor, not a dealer. When in 1947 and 1948 they acquired 25 lots more, as described above (ten lots for homes, some for fees and others for miscellaneous reasons), this gave them 157 lots. They made no effort to sell, but sold only when buyers sought them out and offered satisfactory prices. In such a situation with no sales effort it would take quite a while—in this case years—for enough buyers to find the owners of the lots to buy even the 140 lots the record shows were sold in the ten year period presented here, 1943 to 1952, inclusive. The dribbling along of the sales over that period shows the taxpayers to have been investors selling their investments if and when some enterprising buyer sought them out and offered a satisfactory price. The way these sales came about and the lack of promotion and other activity negatives the theory that taxpayers were in the business of selling lots, or that they had or sought customers.

In *Phipps v. Commissioner of Internal Revenue* (2d Cir.), 52 F. 2d 469, 471, the taxpayers had bought tracts

2 lots near Sunland, many miles from other property owned by taxpayers, and of different character, taken partly in payment of fee for legal services, and held several years [Tr. p. 21];

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In *Phipps v. Commissioner of Internal Revenue* (2d Cir.), 52 F. 2d 469, 471, the taxpayers had bought tracts

of Florida real estate. After buying the tracts the taxpayers "bought very little." The court in holding that the taxpayers were not in business said:

> "The real estate transactions of the taxpayers during 1924 and 1925 apparently consisted only in selling the remainder of the Palm Beach tract which had then been held for seven or eight years and in holding a few other lots for opportune offers. No purchases during these years are shown. . . .
>
> "Persons with large incomes of course invest their surplus funds in something, and if, to diversify their holdings, they buy land, with the expectation of selling it when a good price is offered, such an expectation cannot, in our opinion, convert some sales of land that had been held for seven or eight years into a trade or business in real estate. There should be a greater continuity and larger absorption of time in such transactions to make the taxpayers more than investors. A fair reading of the record makes it clear that nothing was done during the years in question but to hold land for sale which had been previously purchased, and to accept such offers from purchasers as were presented by brokers and seemed satisfactory. . . . They had not continuously engaged in the development and sale, or the purchase and sale of lands. . . ."

No sale in and of itself was doing business, nor did it make selling the ordinary course of trade or business of the taxpayer; nor would 84 such sales in seven years—one a month—do so. Nor was the buyer at such a sale taxpayer's customer. Taxpayer had no part in creating the demand in people's minds for this property. Certainly the development of such a demand in the public's mind cannot constitute doing business on the part of taxpayer.

Nor did people who wanted lots thereby become taxpayers' customers. The fact that in such a market the sales dribbled along over seven years without selling all of the lots is evidence that there was no activity tending to produce sales or creating a condition in which taxpayers could be said to be in business of dealing in real estate. Certainly activity on the part of people who wanted to buy does not change taxpayers from investors into dealers.

Likewise the important thing is not whether sales were made, but whether they were made while doing a business. The fact that somebody took property off the hands of the owner thereof does not prove anything.

The size of the profit resulting from a given sale or many sales would not change the character of the transaction. The sale of these 140 lots, 84 sales in seven years, acquired as they were with no replenishment, certainly negatives the idea of selling in the regular course of business to customers. The person who is in business buys as well as sells.

Nature and Extent of Taxpayer's Business.

Taxpayer, Marian H. Austin, was at all times a housewife, and had nothing to do with acquiring or selling the property in question here. Taxpayer, Robert E. Austin, began practicing law in Los Angeles in 1912, and (when the case was tried in the court below) in 1957, forty-five years later, he was still there in his office part of every business day, and had been through all the intervening years. Taxpayer has always been a lawyer and has practiced law on Spring Street in Los Angeles at all times since 1912. In the ten years presented by the Commissioner here taxpayer collected one thoussand two fees, about two a week. [Tr. p. 24.] They averaged about

$65.00. A lawyer who maintains such a practice running along at about one hundred fees a year of that size would have to be devoting most of his time to that business. In his brief in the court below respondent's counsel suggested that this "practice could not have been very active." Most people are poor people and the clients of most lawyers are in this class, and the lawyer who serves them necessarily does a lot of work and collects rather small fees. In any event the one hundred or so fees collected by taxpayer in 1950 represented probably a thousand times as much work and thought as the five sales made by him in that year, and the same holds true for each and every other year.

Activity of Seller About the Property.

Taxpayer acquired a lot in Manhattan Beach in 1919 which he continued to own and use as a site for a beach cabin and then his home for many years. The next real estate contact shown by the record was in 1943 when he with others, for the purpose of getting lots back on the tax roll of the city for benefit of the city caused the County Tax Collector to put on sale a substantial number of beach lots then owned by the State of California acquired for nonpayment of taxes. As shown by the evidence the Tax Collector would not then list a lot for sale unless the person requesting it to be offered agreed to appear and bid. Taxpayer, with others, requested many lots to be put on the list for sale and each of the parties making the request promised to appear at the sale and make a bid. [Tr. pp. 19-20.] Pursuant to that arrangement taxpayer caused thirty or forty lots to be put on the list for sale and appeared at the sale and offered bids on each lot. All but one of them were taken by other bidders. Taxpayer, at that sale in 1943, acquired title to one lot which he sold

in 1950, seven years after purchase. At the same sale he bid in a lot for a friend which five years later was sold by the Tax Collector again for nonpayment of taxes. The next real estate transaction was in 1944 when a client deeded three lots in Riverside and San Bernardino Counties to taxpayer in payment of fees. These lots were abandoned and later sold by the Tax Collector for delinquent taxes and lost to taxpayer. The same year, 1944, taxpayer purchased two lots across the street from his home, which the record shows he sold in 1952, eight years later after sale or abandonment of that home. Later taxpayers purchased two other lots for the same purpose. They were also sold after sale or abandonment of that home.

Then comes the year 1945-1946 in which taxpayer purchased the 132 lots above discussed.

Lawyers as a class are reputed to be careless investors and are generally known as "easy marks." The purchase of the lots in 1945-1946 by a lawyer then sixty years old who had been diligently practicing law in Los Angeles for 38 years without any previous experience with real estate, would seem to be a prize example of this inaptitude. The property purchased was in an area apparently dead so far as real estate values and real estate activities was concerned. The lots concerned were in an area where very large portions of the property had been sold to the State for nonpayment of taxes. Experienced real estate operators such as the Pacific Land and Title Company and The Amaranth Land Co. were getting out. The purchases and the way they were made show a complete lack of purpose to engage in the real estate business in taxpayer.

The profit made by taxpayers on the real estate under consideration here was due to an unexpected boom with

which he had nothing to do. This turned what in the ordinary course of events would have been a nightmare into a fairy tale. The property he had acquired did not profit from an afterwar boom at the end of the first world war. It continued to be so undesirable that a large part of it had been sold through the years to the State of California for nonpayment of taxes. The purchase of the 132 lots was not part of any smart plan. Taxpayer inadvertently stumbled into it.

After the war ended and people began to get back to civilian activities inquiries began to come from people who wanted to buy lots. Nearly all were by letter or telephone. These phone calls cannot have represented more than ten or fifteen minutes of taxpayer's time on any sale and the time used at the office in filling out blanks (deeds—notes —deeds of trust or contracts of sale) for any transaction would not be very much more than filling out a blank check or two. Blank deeds, notes, deeds of trust and contracts of sale are distributed without cost by banks, trust companies and escrow agencies, and are generally used in such transactions. So the charge by the Tax Court Judge that the legal work involved was important [Tr. p. 28] has no foundation. Taxpayers contributed nothing substantial in time, effort or planning to these sales, and certainly had *no customers* nor *business involving sale of real estate.*

In fact the court below in its findings determines that there was no activity which could be construed as amounting to a business.

It found [Tr. pp. 25, 26] that

> "Petitioners did not advertise" nor "did they post any 'for sale' signs." "They did not list their property with real estate brokers, and neither of them was

a licensed real estate broker. They did not maintain an office in their home, and their home telephone number was listed under the name of Marian H. Austin" (the wife).

"Sales were initiated by prospective customers contacting petitioners through the mails or over the telephone. Negotiations were conducted in the same manner, and petitioners often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties." "Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at petitioners' home."

"There has been a large amount of real estate development in Manhattan Beach since 1945. People interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Petitioners were aware of this situation."

These findings seem to eliminate all possible activity that might constitute doing business.

The only finding of activity is: "Whenever necessary Robert would prepare legal documents in connection with a sale in his law office."

There is also in the findings by the court below the statement: "Petitioners sometimes borrowed money from banks to help finance real property purchases." [Tr. p. 26.] This probably is not material to the issue but even it is not supported by the evidence. The only testimony

on this subject came in cross-examination of taxpayer [Tr. p. 81] and is as follows:

> "Q. Now, over the years, the years in question and prior years, isn't it true that you made many loans from various different banks, real estate loans, I assume, for the purpose of financing— . . .
>
> The Witness: Well, I borrowed a good deal of money from the banks, but just this minute it would be hard to tell you what any particular loan was for.
>
> I made some improvements and found myself short of money, and went to the bank and borrowed money to make up the shortage."

We do not think this testimony supports the idea of borrowing to finance the purchasing of real property. The testimony shows that 132 lots of the 184 purchased during the period under consideration were acquired for small amounts. Nine for $575.00; 21 for $2,400.00; 102 for the cost paid out by the City for acquiring the tax deeded lots. The tax returns in evidence for the years 1950, 1951 and 1952 each show that the improvements on real property from which rent was collected were valued at $37,-500.00. This would seem to be under the circumstances more likely to be the occasion for bank loans than the purchase of lots mentioned herein.

Extent and Substantiality of the Transactions.

As it turned out the profits on the five sales in 1950 amounted to $7,782.56; that is, $1,556.61 for each sale. This compared to the $57.50 fee taxpayer collected from each client served in 1950 shows that the investments were paying off, but they were nevertheless investments and the sales were certainly the sales of assets improvidently acquired and the profits do not indicate any activity on the

part of taxpayer. There was no replenishment of stock. Taxpayers consider themselves investors in this situation, though the thought never occurred to them until since the discussion of income tax brought it up. They did nothing to produce sales or to bring in customers. The court below points out taxpayers did not advertise or publicize their properties because it wasn't needed—they spent very little time on sales but they spent enough. If they did nothing to carry on the business of selling real estate and spent little or no time in it how can they be charged with *selling to their customers* or of selling in the *regular course of their business.* The activity shown does not amount to a business. The matter of selling property and making a profit is not enough to defeat taxpayer's claim for capital gains treatment. If it were so the statute would be idle. It gives the taxpayer in such cases as this the right to capital gains treatment unless (1) *the property was held by the taxpayer primarily for sale to customers,* and (2) *it was sold in the ordinary course of his* (the taxpayers) *trade or business.* Business mentioned in the statute means "busyness." It implies that one is kept more or less busy; that the activity is an occupation. (*Snell v. Commissioner* (5 Cir.), 97 F. 2d 891.) All investors sell their property when a buyer offers a satisfactory price.

We submit that there is no evidence that selling real estate was taxpayers *trade* or his *business,* or that taxpayer had or expected to have or did anything to acquire customers.

We think the court below erred by considering the profits accruing as evidence of activity in the face of positive evidence and the court's own finding that there was no activity. Mere profits are not evidence of activity.

In *Taylor v. Commissioner of Internal Revenue* (2 Cir.), 76 F. 2d 904, the Court of Appeals held that the mere amount and value of shares of stock in which the taxpayer dealt, did not make him a "trader," or his transactions in corporate securities a "business."

That case too involved a lawyer. He gave practically all of his time to his profession. However, at the end of 1925 he had on hand 4,500 shares of certain stock, 2,533 shares of which were purchased in August of that year. He purchased 800 more shares in January, 1926; 600 shares in January, 1927; 400 shares in February, 1927; 1,800 in April, 1927; 200 in June, 1927; 1,000 in September, 1927. In 1929 he reported a net gain of $490,000.00 from the sale of 14,000 shares.

It appeared that he gave very little time to the purchase and sale of stock and held most of the shares for more than two years. The court held the stock to be capital assets. The court said

> "the mere amount and value of the shares of Public Service Corporation, or other stock in which the taxpayer dealt, did not, in our opinion make him a 'trader,' or his transactions in corporate securities a 'business' in the purchase of stocks held 'primarily for sale.' It seems plain that the shares in question were not 'primarily held for sale in the course of . . . trade of business. . . .'"

In *Delsing v. United States* (5th Cir.), 186 F. 2d ....., it was an admitted fact that the taxpayer's sales activities constituted his major activity, and from this the trial court found that any sale of real estate by him was in the ordi-

nary course of his business. The Court of Appeals in reversing the judgment stated that "the disparity between income from sales and from rentals was not controlling and that there was no basis for a determination that the sales of the originally constructed defense rental housing units constituted a disposition of "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business" so as to render the profit taxable as ordinary income."

In the instant case the size of the profit had no relation to appellant Robert E. Austin's time or effort. The matter of profit should not determine whether or not he was in business. To hold otherwise would mean that a person who lost money could never be in business. Appellants had nothing to do with creating the market for their property. The boom came and fortunately they made some money on what were purely investments.

Not a single act or fact in the record shows any activity. The court dismisses all of the evidence that there was no activity—no advertising—no improvements—no time spent on the sales on the ground that one might carry on a business in the absence of either of them. But nowhere is it pointed out what was done that constitutes doing business. The cases cited in the opinion each points out that absence of one or another of activities usually present in business does not defeat the idea that taxpayer was actually engaged in business, but in each case some affirmative facts are presented to show that taxpayer was in business. In our case the lack of advertising, of seeking cus-

tomers, and other activities is pointed out, but nowhere is it pointed out that there was any activity of any kind constituting doing business.

Taxpayer "could have maintained a more passive role only by refusing to sell at all. (*Frieda E. J. Farley, 7* T. C. 198 (1946).)

We respectfully submit that the judgment of the court below should be reversed.

ROBERT E. AUSTIN, and
WENDELL H. DAVIS,
Attorneys for Petitioners.